# STATE OF MICHIGAN

# COURT OF APPEALS

---

AMY PABERZS,

Plaintiff-Appellee,

v

EIGHT STAR LIMITED PARTNERSHIP,

Defendant-Appellant,

and

WBNCC, JOINT VENTURE,

Defendant.

UNPUBLISHED
May 1, 2014

No. 313198
Oakland Circuit Court
LC No. 2011-122395-NO

---

AMY PABERZS,

Plaintiff-Appellee,

v

EIGHT STAR LIMITED PARTNERSHIP and WBNCC, JOINT VENTURE,

Defendants-Appellants.

No. 314892
Oakland Circuit Court
LC No. 2011-122395-NO

---

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

In Docket No. 313198, defendant Eight Star Limited Partnership (Eight Star) appeals by leave granted the trial court's order granting in part the motion of plaintiff Amy Paberzs, which requested leave to file an amended complaint to add West Bloomfield Nursing and Convalescent Center as a defendant. In Docket No. 314892, defendants Eight Star and WBNCC, Joint Venture appeal by leave granted an order denying their motion for summary disposition with regard to defendant WBNCC, Joint Venture but granting the motion with regard to defendant Eight Star. We reverse both orders and remand for entry of judgment in favor of both defendants consistent with this opinion.

In this premises-liability action, plaintiff filed a complaint on October 14, 2011, alleging injuries sustained when she tripped and fell in the vestibule of the West Bloomfield Nursing and Convalescent Center on August 15, 2009. Plaintiff named only defendant Eight Star, the owner of the premises, as a defendant in her original complaint. In a motion for summary disposition, defendant Eight Star acknowledged that it owned the property and building from which the nursing center was operated but stated that since 1985 it had leased the property and building to West Bloomfield Nursing and Convalescent Center, Inc., which assigned its interest in the lease to WBNCC, Joint Venture in 1988. Pursuant to the lease and assignment, WBNCC, Joint Venture had full and total responsibility for maintenance and upkeep of the premises, for insuring the premises, and for "all other aspects of possession, maintenance and control" of the premises. On October 10, 2012, the trial court granted plaintiff's motion for leave to file an amended complaint adding West Bloomfield Nursing and Convalescent Center, Inc. as a defendant. The parties subsequently entered into a stipulated order for plaintiff to file a second amended complaint naming West Bloomfield Nursing and Convalescent Center, Joint Venture as a defendant and then stipulated to amend the case caption to name WBNCC, Joint Venture as the true co-defendant.

Defendant Eight Star first argues that the trial court erred by granting plaintiff's motion for leave to amend her complaint. The trial court's decision to allow the amendment of a complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Pleadings may generally be amended "once as a matter of course within 14 days after being served with a responsive pleading by an adverse party." MCR 2.118(A)(1). Otherwise, leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2).

> "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previous allowed, undue prejudice to the opposing party, or where amendment would be futile." [*Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (citation omitted).]

Here, defendant argues that the trial court erred when it permitted plaintiff to amend her complaint to add a party after the statute of limitations for her premises-liability claim had already expired.[1] Plaintiff argues that defendants Eight Star and WBNCC, Joint Venture manipulated the exchange of discovery and engaged in deceptive conduct, and thus the trial court's equitable tolling of the limitations period should be affirmed. The trial court found that "the corporate officers of WBNCC were informed of the allegations in the lawsuit at a very early stage" and therefore "the true defendant had notice of the litigation and was not prejudiced by the amendment. . . . [T]his is a case where the right party was sued under the wrong name."

[1] Plaintiff's complaint alleged that she was injured on August 15, 2009. MCL 600.5805(10) sets forth a three-year period of limitations for personal injury actions. Thus, the period of limitations for plaintiff's claim expired on August 15, 2012.

The trial court permitted plaintiff to amend her complaint on the basis of its determination that this case involved only a misnomer, rather than the addition of a new party. However, the record indicates that Eight Star and WBNCC, Joint Venture are separate and distinct corporate entities.

> "'"As a general rule, . . . a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties.'" *Parke, Davis & Co v Grand Trunk R System*, 207 Mich 388, 391; 174 NW 145 (1919) (citation omitted). The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, "'[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name[.]'" *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960), quoting *Daly v Blair*, 183 Mich 351, 353; 150 NW 134 (1914). . . . Where, as here, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable." [*Miller*, 477 Mich at 106-107 (citation omitted).]

In the present case, the right corporation was not sued under the wrong name. Rather, the wrong corporation, Eight Star, was sued under its own name. This is not a misnomer situation in which a technical defect could be cured by amendment. Thus, there should be no relation back to the date of the filing of the original complaint. When plaintiff finally sought leave to amend her complaint to add a new party, the statute of limitations had already expired. Therefore, allowing the amendment was futile. The trial court abused its discretion by allowing plaintiff to amend her complaint to add a new defendant.

Defendants Eight Star and WBNCC, Joint Venture next argue that the trial court erred by denying their motion for summary disposition with regard to WBNCC, Joint Venture. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). This Court also reviews de novo whether a statute of limitations bars an action. *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006). When the undisputed facts demonstrate that the plaintiff's claim is barred by the applicable statute of limitations, summary disposition is appropriate under MCR 2.116(C)(7). *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). The defendant who relies upon a statute of limitations defense generally has the burden to prove facts establishing that the statute applies. *Id*.

Defendants argue that the statute of limitations barred the addition of WBNCC, Joint Venture as a party. It is undisputed that plaintiff's cause of action accrued when she tripped and fell in the vestibule of West Bloomfield Nursing and Convalescent Center on August 15, 2009, and that a three-year statute of limitations applies to her claim. MCL 600.5805(10). Thus, the statute of limitations expired on August 15, 2012. Plaintiff did not move for leave to amend her complaint until September 13, 2012.

In allowing the amendment, the trial court relied upon *Wells v Detroit News, Inc*, 360 Mich 634; 104 NW2d 767 (1960), and *Cobb v Mid-Continent Tel Serv Corp*, 90 Mich App 349; 282 NW2d 317 (1979), ruling that a narrow exception to the general rule against equitable tolling

exists when the wrong party is named and the correction is made after the limitations period for the claim has expired. The trial court determined that the instant case involved a mere misnomer and that equitable tolling of the limitations period should therefore apply. We disagree.

This case does not present a misnomer situation. As discussed previously, the original defendant Eight Star was not misnamed. Instead, plaintiff was granted leave to add an entirely new party, which was a separate and distinct corporate entity from Eight Star. Application of equitable tolling to allow the addition of a new party was inappropriate.

Moreover, we note that Eight Star placed plaintiff on notice in its first responsive pleading that Eight Star was not in control of the West Bloomfield Nursing and Convalescent Center and was therefore the wrong defendant. Defendant Eight Star also sent a letter to plaintiff's counsel on December 7, 2011, more than eight months before the limitations would expire, stating that it did not have possession, dominion or control over the premises at issue at the time of plaintiff's fall and that the premises were actually occupied and operated by WBNCC, Joint Venture. Defense counsel subsequently provided plaintiff a copy of the lease on July 30, 2012. Despite having this information and many opportunities to add WBNCC, Joint Venture, plaintiff failed to act until after the statute of limitations had expired. Accordingly, the doctrine of equitable tolling should not have been applied in this case. See *Ward v Rooney-Gandy*, 265 Mich App 515, 520; 696 NW2d 64, rev'd on other grounds 474 Mich 917 (2005) (noting that "[a]n element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim"). The trial court should have granted WBNCC, Joint Venture's motion for summary disposition on the basis of the expiration of the period of limitations.

In summary, the trial court abused its discretion by allowing plaintiff to amend her complaint to add WBNCC, Joint Venture as a defendant and by denying summary disposition for WBNCC, Joint Venture on the basis of the statute of limitations. In light of our conclusions in this regard, we need not decide whether plaintiff acted with unclean hands in this case.

Reversed and remanded for entry of judgment in favor of both defendants consistent with this opinion. We do not retain jurisdiction. Defendants, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen